No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETTTIONERS

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BRIEF FOR PETITIONERS

A. REFERENCE TO REPORTS.

The opinion of the Court of Appeals is reported at 371 F. 2d 296.

B. JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U.S.C. Section 1254 (1). The judgment of the Court of

Appeals was entered on December 7, 1966. A petition for rehearing was timely filed and there denied on January 23, 1967. The petition for writ of certiorari was filed in this court on February 21, 1967 and certiorari was granted on June 12, 1967.

C. STATUTES AND AMENDMENTS TO THE UNITED STATES CONSTITUTION INVOLVED.

Title 18, U.S. Code, Section 2113 provides in relevant part:

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, or any savings and loan association"
>
> "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

AMENDMENT IV TO UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED:

1. Was Petitioner, Simmons' pre-trial identification so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of Law?
2. Did the Trial Court err in refusing a defense request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from Government witnesses subsequently incorporated by reference into the witnesses' written statements where identity was the vital issue of the trial?
3. Should a defendant who testifies to enforce his constitutional rights as guaranteed by the Fourth Amendment be required to sacrifice his rights under the Fifth Amendment?

STATEMENT OF THE CASE.

A. Nature of the Case and its Disposition:

Following a jury trial held in the District Court for the Northern District of Illinois, petitioners and William Andrews were convicted on an indictment charging them with taking a sum of money from a federally insured savings and loan association in violation of Section 2113, Title 18 of the United States Code (Count I); (b) with putting the lives of the employees of the same savings and loan association in jeopardy by the use of dangerous weapons in violation of Section 2113, Title 18 of the United States Code (Count II) (R 1-2).

Upon the return of the verdict of guilty, petitioners were sentenced to the custody of the Attorney General for imprisonment for a period of 10 years. The conviction of the petitioners was affirmed by the Court of Appeals for the Seventh Circuit, 371 F.2d 296, and the conviction of the defendant, Andrews, was reversed without remand. This Court granted a Petition for Certiorari, which Petition questioned the investigative technique of the Federal Agents which focused the attention of identification witnesses on one particular suspect; the trial court's refusal of the defense's request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from Government witnesses; and the court's requiring a defendant to sacrifice his rights under the Fifth Amendment in order to enforce his constitutional rights as guaranteed by the Fourth Amendment.

B. The Evidence:

On February 27, 1964, at about 1:45 P.M., two men, later identified as Simmons and Garrett, entered the Ben Franklin Savings and Loan Association, 4812 South Pulaski

Road, Chicago, and asked for a money order (R. 6). One of the men then thrust a gun through one of the teller windows, handing the teller a bag and demanding that she "sack it or stack it." (R. 29). The teller filled the bag with some $1,500.00 and the two men fled. The two men were in the bank about five minutes (R. 31). Mr. Mazaika, an employee of the savings and loan followed the men outside into the street and saw them drive away in a white 1960 Thunderbird. (R. 7). Mr. Mazaika said the car had a big scrape along the passenger side of the door. (R. 7). The police immediately searched the area to locate the described automobile. (R. 14). At about 2:30 P.M., this search led to a Thunderbird owned by Mary Ruth Rey, a sister of the defendant, Andrews. (R. 14). Andrews had borrowed the car from his sister on the day of the robbery at about 11:30 A.M. to drive to Indiana. He returned it at 2:30 P.M. according to Helen Scapardine who was using the car while Mrs. Rey was in the hospital (R. 47-49).

The next day the F.B.I. obtained from Patricia Schuster, another sister of Andrews, several snapshots of Simmons and Andrews. Patricia Schuster is also Simmons' sister-in-law. (R. 39).

On this same day, or shortly thereafter, each savings and loan employee viewed these snapshots. Prior to the viewing of the snapshots, the employees had discussed with each other what they had seen at the time of the robbery. The snapshots were shown to the employees one after another at the savings and loan. Five of the employees who identified Simmons revealed that the FBI had shown them a group of five or six snapshots of which several were photos of Thomas Simmons.

Phillip Mazaika said he saw five or six snapshots of which two were photos of Simmons. (R. 51, 53). Florence Babick said she saw three pictures of Simmons. (R. 56).

Mary Bialek, who viewed pictures several times before the trial, said she saw several pictures of Simmons. (R. 67). Bernice Parliaman remembered that she saw three or four pictures of Simmons among the seven she viewed (R. 75-76). And, Bernadine Dziedzic saw two or three pictures of Simmons among the six pictures she viewed after the robbery. (R. 32).

The prosecutor shortly before the trial, visited the witnesses and again showed them pictures. (R. 75, 80). Mary Bialek testified that she viewed pictures of Simmons the day before she testified and identified him in Court. (R. 25). Bernice Parliaman said she viewed six pictures, all of them either of Simmons or of Andrews, when she was served with a subpoena to testify. (R. 75). Bernadine Dziedzic also viewed pictures of Simmons a week and a half before the trial when the Assistant United States Attorney visited her at the savings and loan with four pictures. (R. 32).

On the day of the trial, prior to testifying, the witnesses, in the company of the Agents of the FBI and other witnesses, saw the petitioners in the courtroom. (R. 8, 18, 25).

None of the witnesses were asked by the police or the F.B.I. to view a lineup of possible suspects. (R. 9).

Phillip Mazaika told the F.B.I. agents on the day of the robbery, and later testified that the man he had identified as Thomas Simmons had a Tennessee accent when he spoke in the savings and loan association. (R. 11, 51-52). Prior to that, the F.B.I. knew that Simmons was living in Pulaski, Tennessee. (R. 36, 45).

At approximately three o'clock in the afternoon of February 27, 1964, six men with drawn guns forced their way into the home of Mrs. Mahon, the mother of the defendant,

Andrews. After ransacking the house without permission, they suddenly left, taking nothing. (R. 23, 59-60). Then, at about 6:30 P.M. agents Huntington and Quinlan of the F.B.I. arrived at Mrs. Mahon's house, without a warrant (R. 60) and went directly to the basement where they found two suitcases in which money wrappers and other incriminating evidence were found. Mrs. Mahon stated that she gave no permission and asked them not to take anything (R. 60). Agent Huntington said that they had consent, and that they were escorted to the basement where the suitcases were found (R. 23). At trial, the Petitioner Garrett moved to suppress the suitcases as evidence, and took the stand in his own behalf to testify that one of the suitcases was his (R. 20). The suitcase had been left at the home of Mrs. Mahon on the morning of February 27, 1964, and Garrett at no time consented to its removal from the premises of his friend's mother (R. 20).

During the trial, Mr. Betts, the Court Reporter, was called by the Government and read to the jury the transcript he had made of the testimony of the Petitioner Garrett during the hearing on suppression of the evidence seized without a warrant (R. 33-35.) This was done over the objection of counsel for the petitioners (R. 33).

Petitioner Simmons swore that he was not in the savings and loan on February 27, 1964. He said that he arrived in Chicago that day along with Garrett and Andrews and went to the home of Pat Schuster his sister-in-law. After visiting with Pat Schuster for about an hour, Simmons went with the other two men to a tavern for a beer. Andrews left the two others to pick up the borrowed car. When the three left the tavern, Simmons went alone to a drive-in for a sandwich. He then went to another tavern for about an hour and then walked back to Pat Schuster's house to pick up his suitcase, arriving there about 2:30 p.m.

Simmons further testified that Andrews and Garrett, who had planned to use the borrowed car for a trip to Indiana, arrived back at Pat Schuster's house at about 2:45 P.M. Joe Franz, proprietor of a newspaper circulation office located nearby, then came and told Simmons that the police were looking for him. Franz, who was questioned by the F.B.I. for six hours but never charged with anything (R. 15) arranged transportation for Simmons to Indiana. Simmons boarded a bus in Indiana for Tennessee (R. 40-42.)

SUMMARY OF ARGUMENT.

I.

The Federal Bureau of Investigation agents focused the identification witnesses' attention to petitioner Simmons as the robber. The agents obtained snapshots of Simmons and the defendant, Garrett and showed only five or six pictures to the witnesses the day after the robbery. Simmons was depicted in two or three of these snapshots. The agents allowed mass psychology to be an important factor in the identification by arranging to have the witnesses together at the savings and loan at the time the pictures were viewed. Prior to the identification the witnesses had discussed the robbery with each other to such an extent that they made statements to the Federal Bureau of Investigation concerning occurrences that they had not actually seen. Affirmative indications of suggestion were evident when a witness testified that Simmons had a Tennessee accent. The Federal Bureau of Investigation knew that Simmons was living in Pulaski, Tennessee. Thus, the pre-trial identification of Simmons was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.

II.

Simmons' counsel's request under Section 3500 of Title 18, United States Code, for pictures used in obtaining the pre-trial statements of Government witnesses was denied. Identity was the vital issue of the trial and without these pictures counsel was unable to clearly reconstruct the manner in which Simmons was identified as the robber. Since the photographs were of a limited number, were relevant to the case on trial and were referred to in the witnesses 3500 statements, the trial court erred in refusing to allow the Government's tender of the photographs.

III.

Petitioner, Garrett in enforcing his rights against unreasonable search and seizure, was obliged to take the witness stand and assert ownership in evidence seized by the Federal Bureau of Investigation agents without a warrant. Over the objection of the petitioners, his testimony in support of the motion to suppress was introduced in the government's case in chief. The trial court's rulings forced Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights.

ARGUMENT

I.

PETITIONER, SIMMONS' PRE-TRIAL IDENTIFICATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT HE WAS DENIED DUE PROCESS OF LAW.

The bank robbery investigative squad of the Federal Bureau of Investigation is the elite of the nation's finest police agency. If these agents are permitted to employ the techniques that deprived petitioner, Simmons, of the standards of fairness required by due process, the less experienced and less thoroughly trained local law enforcement officers can hardly be expected to safeguard a suspect's constitutional rights.

The most important safeguard against an improper conviction of a citizen, is an unbiased impartial police investigation. Police technique must meet with the requirements of decency and fairness established as the fundamental law of the land.

The question here is whether Simmons' pre-trial identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law" guaranteed him by the Fifth Amendment. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966).

The totality of circumstances of the Simmons' pre-trial identification encompass all the dangerous factors which contribute to the illicit identification evidence con-

demned in *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967) and *Stovall* v. *Denno,* 388 U.S. 293 (1967).

As in *Stovall,* the petitioner, Simmons, was identified in what amounted to a one man lineup. On the day after the robbery, the F.B.I. agents obtained snapshots of the petitioner, Simmons, and the defendant, Andrews. On that same day at the savings and loan association, these snapshots were exhibited to the employees. Five of the employees who identified Simmons revealed that they began focusing on Simmons when the agents showed them a group of five or six snapshots of which several were photos of Thomas Simmons. From the time of the robbery to the trial, the memory of the identifying witnesses was further prodded when the prosecutor and F.B.I. agents visited the witnesses and again exhibited these snapshots. Simmons continued to dominate the small group of pictures seen by the witnesses. The last viewing of the pictures occurred the day before trial. A witness testified that the stated purpose of these additional visits was "to be sure we identified the right person". (R. 69). On the day of trial, several of the witnesses accompanied by F.B.I. agents saw two of the defendants in the courtroom.

The likelihood of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification, was demonstrated in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967).

The circumstances of the petitioner, Simmons' case shows the highest degree of opportunity for suggestion. When the witnesses examined the petitioner's snapshots, they were all present at the same time at the savings and loan association. Though the tellers testified that when

they looked at the pictures the other tellers were not in their immediate presence, the danger of mass psychology was apparent. See *Gilbert* v. *California,* 388 U.S. 263 (1967).

Prior to this viewing, they had discussed the facts of the robbery with each other. One teller, Mr. Mazaika, informed the F.B.I. of an occurrence that he had not even seen (R. 12). Mr. Mazaika also told the agents that the man he had identified as Simmons, spoke with a Tennessee accent. At the time he made that statement, the agents were aware that Simmons had been living in Pulaski, Tennessee. The robber identified as Simmons, spoke very little and the only reason that Mazaika gave for the Tennessee accent, was that the robber spoke slower than other southerners.

The witnesses "opportunity for observation was unsubstantial" here since the robbers were only in the savings and loan association about five minutes. The obvious excitement caused by the robbery added to the difficulty of identification. Since the crime here was robbery in which deadly weapons were used, there is present the particular hazard that the "victims understandable outrage may excite revengeful or spiteful motives." *United States* v. *Wade,* 388 U.S. 218 (1967).

It is clear that the totality of circumstances of the petitioner's pre-trial identification conclusively demonstrate that the identification was "unnecessarily suggestive and conducive to irreparable mistaken identification that the petitioner was denied due process of law. *Stovall* v. *Denno,* 388 U.S. 293 (1967).

The necessity of immediate identification that was imperative in *Stovall* was not required in Simmons' case.

The numerous employees of the savings and loan association were available at any time. After obtaining the pictures of the petitioner, Simmons, the federal agents could have readily obtained other pictures that would have made a meaningful lineup identification possible.

Since this is a federal case involving unfair activity on the part of federal agents and prosecutor, this Court should also reverse this case based on its supervisory powers. (cf: *McNabb* v. *United States,* 318 U.S. 332; *Mallory* v. *United States,* 354 U.S. 449; *Elkins* v. *United States,* 364 U.S. 206.

II.

THE TRIAL COURT ERRED IN REFUSING A DEFENSE REQUEST UNDER SECTION 3500 OF TITLE 18, UNITED STATES CODE FOR PICTURES USED IN OBTAINING PRE-TRIAL STATEMENTS FROM GOVERNMENT WITNESSES SUBSEQUENTLY INCORPORATED BY REFERENCE INTO THE WITNESSES' WRITTEN STATEMENTS WHERE IDENTITY WAS THE VITAL ISSUE OF THE TRIAL.

The decision of this Court in *Dennis* v. *United States,* 384 U.S. 855, 870 (1966) in allowing the defense to obtain grand jury testimony of a witness states that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

The purpose of Title 18, Section 3500 of the United States Code is to further fair and just administration of criminal justice. *Campbell* v. *United States,* 373 U.S. 487 (1963). A defendant is given the opportunity to completely develope the underlying foundation for a witness' testimony on direct examination through the use of a prior statement. A jury is able to determine how much weight is to be given a particular witness.

Since the identity of the robbers was the primary issue of the trial, a full disclosure of the manner in which Simmons was identified was vital. There is no question that photographs were used by F.B.I. agents to obtain statements from the witnesses. It is also certain that the witnesses incorporated the pictures by reference in their statements (R. 68). Therefore, counsel for the petitioner Simmons requested the photographs pursuant to Title 18, Section 3500 United States Code. The trial court denied this request (R. 54, 56-57).

The statements of the various witnesses varied on the number of pictures they saw of the petitioners. There was an even greater variance on the total number of pictures exhibited to the witnesses. In fact, it is not even clear that some witnesses viewed pictures of anyone other than a defendant.

From the prosecutor's own statements and the limited cross examination of the witnesses identifying petitioner, Simmons, there must have been grave doubt in the minds both of the trial judge and the jurors on the procedures used to identify Simmons. The prosecutor said there was a "multitude" of pictures involved in the procedure (R. 54). One witness said she saw fifty (R. 69). But all four other witnesses said they saw only about five or six. Obviously the production of the pictures by the prosecution would have greatly aided the defense cross examination of the witnesses to establish for the court and jury exactly what led to the identification of Simmons.

Although the prosecutor indicated he was willing to make available to the defense the group of pictures used by government agents as they focused witnesses' attention on defendants (R. 54), the trial court decided *sua sponte* that the defense would not be permitted to use the group

of pictures in cross examination of the identifying witnesses (R. 54). As a result, the defense was denied access to evidence in the possession of the government.

This court in *United States* v. *Wade,* 388 U.S. 218 (1967) pointed out the difficulties inherent in the reconstruction of a pre-trial lineup by a defense counsel. Simmons' counsel was further handicapped by the fact that pictures were used for the identification. Therefore, even the defendant was not present at the identification and could not in any way, assist his counsel.

Since the photographs were of a limited number, all were relevant to the case on trial, all were referred to in the witnesses' 3500 statements and all were available to be produced by the prosecutor, the trial court erred in refusing to allow the Government's tender of the photographs.

III.

A DEFENDANT WHO TESTIFIES TO ENFORCE HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT SHOULD NOT BE REQUIRED TO SACRIFICE HIS RIGHTS UNDER THE FIFTH AMENDMENT.

To protect his Fourth Amendment rights against unreasonable search and seizure, Garrett was obliged to take the stand and assert ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the Petitioner Garrett have the proper standing to make the objection, it was essential that he so testify. Over the objection of the petitioners, Garrett and Simmons, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase

and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself.

The identification of the defendant Garrett with the suitcase containing the money wrappers and the other incriminating evidence must have made a vivid impression on the jury. If this evidence was improperly admitted, there exists far more than the "reasonable possibility" that the evidence contributed to the conviction which is necessary for reversal. *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87 (1963).

In *Safarik* v. *United States,* 62 F2d 892 (8th Cir. 1933) the defendants made a motion to suppress and in support of that motion filed affidavits admitting the ownership of the seized evidence. The motion to suppress was granted in part and denied in part. The Government introduced at the trial both the motion to suppress and the supporting affidavits. The 8th Circuit held that the affidavits were not admissible at the trial and stated that "the documents were tantamount to a written confession of guilt" and that the admission would make "a rule of evidence and not the Constitution of the United States, the supreme law of the land. To hold so, would render the constitutional guarantees sonorous but impotent phrases."

In *Heller* v. *United States,* 57 F. 2d 627 (7th Cir. 1932) a conviction was affirmed in these words:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon trial of any other issue therein." 57 F 2d 627 at 629.

In a strong and cogent dissent, however, Judge Evans points out that it was necessary for the appellant to make application for the return of the allegedly unlawfully seized property in order to protect himself against the use of such evidence. Judge Evans concludes:

> "The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, as well as his petition, should not be used against him." F. 2d 627 at 630.

A recent decision which is pertinent is *Cristensen* v. *United States,* 259 F. 2d 192 (D.C. Cir., 1958). While the majority affirms convictions in a four-paragraph opinion on the grounds of sufficiency of evidence, Judge Bazelon, dissenting focuses on the exact issue of the present case in a well-reasoned nine-page opinion. It would be presumptive in the brief to attempt to improve upon the scholarly analysis of Judge Bazelon of the law of searches and seizures as applied to the very issue here on appeal. Let it suffice to say that Judge Bazelon, with reference to Judge Evan's dissent in *Heller supra,* points out that no distinction is made between situations where the motion to suppress has been overruled and those where it has been sustained. To summarize, Judge Bazelon states the problem thusly:

> "We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him.
>
> "To be sure, the Fourth Amendment right to be free from unreasonable search and seizure is a right that may be waived. So also is the Fifth Amendment right

> not to be compelled to incriminate one's self. But a rule which compels the defendant to forego one of his two constitutional rights as a condition to exercise of the other is, in my opinion, invalid." 259 F. 2d 192 at 197 (Citations omitted, emphasis in original).

The problem cannot be answered by arguing that the Fourth and Fifth Amendments stand apart from each other. This argument was put to rest in *Davis* v. *United States,* 328 U.S. 582 (1946) wherein Justice Frankfurter said:

> "The law of searches and seizures as revealed in the decision of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States,* 116 U.S. 616. It reflects a dual purpose protection of the privacy of the individual, his right to be let alone, protection of the individual against compulsory production of evidence to be used against him." 329 U.S. 582 at 587.

In the present case, the petitioner Garrett was forced to barter his constitutional protection against an unlawful search and seizure as the price of his good faith effort to exclude the evidence the Government had obtained by a warrantless search. He had no choice; he was forced to take a desperate chance in order to secure the exclusion of the evidence. Failing in his proof, he has been forced to pay an unconscionable price. The identification of the suitcase and its contents was tantamount to an admission of guilt.

United States Ex Rel. Hetenyi v. *Wilkins,* 348 F.2d 844 (2nd Cir. 1965) in a notably careful and well-reasoned opinion, Judge Thurgood Marshall examines the fairness of placing a criminal defendant on the horns of such a dilemma, and finds it contrary to the guarantees afforded by the Constitution. The opinion roundly condemns the

"barter theory of fairness",[1] stating that the Government's argument that the defendant somehow "agreed" to subject himself to re-prosecution if the convictions on the lesser charge were reversed would be "to ignore the elementary psychological realities of the situation." 348 F. 2d 844 at 859. In reply to the Government's arguments based on cases decided near the turn of the century, Judge Marshall outlined the immense strides that have been made in expanding the constitutional protections of the accused in the last few decades. Judge Marshall concluded:

> "(W)e would decline to follow them in applying the fundamental fairness standard, not merely because of their half century antiquity, but because we would not be faithful to the evolution of our social values if we reached any other conclusion." 348 F. 2d 844 at 863.

The Court of Appeals' decision here attempted to dispose of petitioners contention by stating:

> "Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision . . . Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial by jury . . . The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we would in effect be attempting to create a 'judicial amendment' to the constitution to protect persons from the risks of errors of judgment in trial tactics." (Appendix A, p. 4).

The court in so holding, is placing a burden and a risk on only one party to the lawsuit. The Government has the burden of proving its case. Looking at the case from this

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[1] See also:

point of view, the trial court should have required the United States to prove its case independently of a windfall at the time of trial. If the petitioner Garrett had testified in the defendant's case in chief, obviously this would be a matter of trial tactics and any information obtained from him on cross examination would be binding against him. However, when the defendant Garrett attempted to avail himself of the constitutional safeguard against unlawful search and seizure, his action was not a matter of trial tactics. *United States* v. *Blalock*, 253 F. Supp. 860 (E.D. Pa. May 13, 1966); *People* v. *DeFilippis*, 34 Ill. 2d 129, 214 N.E. 2nd 897 (March 23, 1966).

Therefore, the trial court erred in permitting the testimony of the petitioner Garrett in support of his motion to suppress the evidence to be read to the jury as part of the government's case in chief.

CONCLUSION

For the reasons herein expressed, petitioners pray that their conviction be reversed.

Respectfully submitted,

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